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Gemilang Mirza Sdn Bhd & Ors v Public Prosecutor

HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL NO BKI-42–83/11 OF 2011
CHEW SOO HO J
26 APRIL 2013

Criminal Law — Receiving deposits from public without valid licence — Banking and Financial Institutions Act 1989 s 25(1) — Appeal against conviction and sentence — Whether strict liability offence — Whether prima facie case proven — Burden on accused to prove existence of valid licence — Whether conviction wrong in light of acquittal from charges under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — Whether conviction wrong in light of failure to identify funds from illegal deposits taking — Whether accused running lawful business concept — Banking and Financial Institutions Act 1989 ss 2, 4, 6(4), 25(1), 25(3) & 106(1)

Criminal Procedure — Appeal — Appeal against sentences — Receiving deposits from public without valid licence — Fine of RM3,000,000 for company and imprisonment of six years each for directors — Whether manifestly excessive — Illegality activity causing great losses to public — Protection of innocent public

The first appellant was charged with the offence of receiving deposits from the public without a valid licence granted under s 6(4) of the Banking and Financial Institutions Act 1989 ('the BAFIA') to carry on banking, finance company, merchant banking or discount house business. Both the second and third appellants were charged as the directors of the first appellant. The appellants were found guilty and convicted at the end of the defence case. The first appellant was sentenced to a fine of RM3,000,000 whilst the second and third appellants were sentenced to imprisonment of six years each. The appellants appealed against conviction and sentence. The issue arising for determination was whether the learned sessions judge ('the judge') had erred in ruling that the respondent had successfully proved a prima facie case against the appellants under s 25(1) of the BAFIA when the appellants were acquitted from the charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') on ground of the respondent's failure to identify the funds from the illegal deposits taking and the stockiest business; and having called for the defence, whether the judge had adequately considered the defence which was a business concept known as 'Rakan Niaga' participated by partnership and run by stockiest or partners.

Held, dismissing the appeal against conviction and sentence:

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(1) Reading ss 4 and 6(4) of the BAFIA together with s 25(1) of the BAFIA, the offence under s 25(1) appears to be akin to an offence of strict liability in the sense that a valid licence is absolutely necessary for any person to receive, take or accept deposits within the meaning ascribed to under the BAFIA and it is for the person who receives, takes or accepts deposits to show that the said 'deposits' were not as defined under s 2 as modified under s 25(3) of the BAFIA or that such 'payments or repayments' were money paid bona fide as provided in the four limbs (A) — (D) in the definition of 'deposit' under s 2. From the definition of 'deposit', the respondent needed to prove that a sum of money received by or paid to the appellants was on the terms that (a) under which it will be repaid, with or without interest or at a premium or discount; or (b) under which it is repayable, either wholly or in part, with any consideration in money's worth. So long as one of these ingredients were proved, there was no necessity for the respondent to prove that the appellants did not possess a valid licence granted under s 6(4) of the BAFIA. It was for the appellants to prove that they had a valid licence granted under s 6(4) of the BAFIA (see para 10).

(2) Once the respondent had proved the ingredient of 'deposit' coupled with the fact that the appellants did not possess a valid licence to conduct such banking activity though not obliged to, the onus of proof under ss 102 and 103 of the Evidence Act 1950 ('Act') was on the defence to show that such receipts or payments of money were bona fide as prescribed under limbs (A) — (D) in the definition of 'deposit' under the BAFIA (see para 10).

(3) Even if the appellants were acquitted and discharged from the charges under the AMLATFA that itself did not vitiate the charges under the BAFIA for simple reason that the ingredients of the charges under s 25(1) of the BAFIA are distinct and separate from s 4 of the AMLATFA charges and s 25(1) of the BAFIA charges are not dependent on the s 4 of the AMLATFA charges (see para 11).

(4) There is no requirement in law under s 25(1) of the BAFIA to prove which sum in the first appellant's account was derived from the illegal deposits taking and which money was from the stockiest business (see para 12).

(5) No statements of account was produced by the appellants to show that the payments received were bona fide and were not tied to the illegal deposits taking nor any witness being called to testify to that effect. The appellants had thus failed to satisfy the evidential burden under ss 102 and 103 and/or s 106 of the Act (see para 13).

(6) A mistake in law is no defence as ignorance of the law is no excuse. The law as stipulated in s 25(1) read with s 2 definition of 'deposit' and

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s 106(1) of the BAFIA prescribes the offence in clear term. It was unsustainable for the defence to contend that they were ignorant of the law as it was the appellants' duty and responsibility to find out before they embarked onto such business (see para 19).

(7) The sentences were not manifestly excessive in the light of the seriousness of the crime where the maximum imprisonment is ten years and a maximum fine of RM10m. Money of members of the public through such illegal deposit taking activity without a valid licence would not be subject to proper supervision and governance by Bank Negara Malaysia and such illegality activity would ultimately lead to great losses suffered by the public. It is in the public interest that the court ought to view such crime seriously so that innocent public may not be lured to invest in such activity (see para 24).

[Bahasa Malaysia summary

Perayu pertama telah dituduh dengan kesalahan menerima deposit-deposit daripada orang awam tanpa lesen sah yang diberikan mengikut s 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA') untuk menjalankan perbankan, syarikat kewangan, perbankan saudagar atau perniagaan gedung diskaun. Kedua-dua perayu kedua dan ketiga dilantik sebagai pengarah perayu pertama. Perayu-perayu didapati bersalah dan telah disabitkan pada akhir kes pembelaan. Perayu pertama dijatuhkan hukuman denda sebanyak RM3,000,000 sementara perayu kedua dan ketiga dijatuhkan hukuman penjara selama enam tahun setiap seorang. Perayu-perayu merayu terhadap sabitan dan hukuman. Isu yang timbul untuk penentuan adalah sama ada hakim mahkamah sesyen ('hakim') telah terkhilaf dalam dapatan bahawa responden telah berjaya membuktikan kes prima facie terhadap perayu-perayu di bawah s 25(1) BAFIA apabila perayu-perayu telah dilepaskan daripada tuduhan di bawah Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLATFA') atas alasan kegagalan responden untuk mengenalpasti dana-dana daripada deposit yang diambil dengan tidak sah dan perniagaan stokis; dan dengan memanggil pembelaan, sama ada mahkamah dengan sepatutnya telah mempertimbangkan pembelaan yang mana merupakan konsep perniagaan dikenali sebagai 'Rakan Niaga' yang mana disertai oleh perkongsian dan dijalankan oleh stokis atau rakan kongsi.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

(1) Membaca ss 4 dan 6(4) BAFIA bersama dengan s 25(1) BAFIA, kesalahan di bawah s 25(1) kelihatan seperti kesalahan liabiliti ketat dalam erti kata lesen sah adalah sangat perlu bagi seseorang untuk menerima, mengambil atau menerima deposit dalam maksud yang dinyatakan di bawah BAFIA dan adalah bagi orang yang menerima, mengambil, menerima deposit untuk menunjukkan bahawa 'deposits' tersebut tidak seperti yang didefinisikan di bawah s 2 yang diubah di

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bawah s 25(3) BAFIA atau bahawa 'payments or repayments' sedemikian adalah wang yang dibayar secara bona fide seperti yang diperuntukkan di dalam empat bahagian (A) — (D) di dalam definisi 'deposit' di bawah s 2. Daripada definisi deposit, responden perlu membuktikan bahawa jumlah wang yang diterima oleh atau dibayar kepada perayu-perayu adalah atas syarat bahawa (a) ia akan dibayar semula dengan atau tanpa faedah atau pada premium atau diskaun; atau (b) ia boleh dibayar, sama ada secara penuh atau sebahagian, tanpa sebarang pertimbangan dalam bentuk wang. Asalkan salah satu intipati dibuktikan, tidak terdapat keperluan bagi responden untuk membuktikan bahawa perayu-perayu tidak mempunyai lesen sah yang diberikan di bawah s 6(4) BAFIA. Adalah perlu bagi perayu-perayu untuk membuktikan bahawa mereka mempunyai lesen sah yang diberikan di bawah s 6(4) BAFIA (lihat perenggan 10).

(2) Setelah responden membuktikan intipati 'deposit' bersama fakta bahawa perayu-perayu tidak mempunyai lesen yang sah untuk menjalankan aktiviti perbankan walapun tidak diwajibkan untuk, beban pembuktian di bawah ss 102 dan 103 Akta Keterangan 1950 ('Akta') terletak pada pihak pembelaan untuk menunjukkan bahawa resit atau pembayaran wang adalah bona fide seperti yang diperuntukkan di bawah bahagian (A)-(D) di dalam definisi 'deposit' BAFIA (lihat perenggan 11).

(3) Meskipun perayu-perayu telah dilepaskan dan dibebaskan daripada tuduhan di bawah AMLATFA yang mana dangan sendirinya tidak melemahkan tuduhan di bawah BAFIA dengan sebab ringkas bahawa intipati-intipati tuduhan di bawah s 25(1) BAFIA adalah berbeza dan berasingan daripada tuduhan s 4 AMLATFA dan tuduhan s 25(1) BAFIA adalah tidak bergantung kepada tuduhan s 4 AMLATFA (lihat perenggan 11).

(4) Tiada keperluan di dalam undang-undang di bawah s 25(1) BAFIA untuk membuktikan jumlah yang mana di dalam akaun perayu pertama yang diperolehi daripada pengambilan deposit secara tidak sah dan yang mana daripada perniagaan stokis (lihat perenggan 12).

(5) Tiada penyata akaun yang dikemukakan oleh perayu-perayu untuk menunjukkan bahawa bayaran yang diterima adalah bona fide dan tidak terikat kepada pengambilan deposit secara tidak sah atau mana-mana saksi yang dipanggil untuk memberi kenyataan kepadanya. Justeru, perayu-perayu gagal untuk memenuhi beban pembuktian di bawah ss 102 dan 103 dan/atau 106 Akta (lihat perenggan 13).

(6) Kesilapan di dalam undang-undang bukanlah pembelaan seperti terhadap mana kejahilan undang-undang bukanlah satu alasan. Undang-undang seperti yang diperuntukkan di dalam s 25(1) dibaca dengan definisi 'deposit' s 2 dan s 106(1) BAFIA yang memperuntukkan

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kesalahan dalam terma yang jelas. Adalah tidak boleh dipertahankan oleh pembelaan untuk berhujah bahawa mereka jahil akan undang-undang sepertimana menjadi tugas dan tanggungjawab perayu-perayu untuk mengambil tahu sebelum mereka menyertai perniagaan tersebut (lihat perenggan 19).

(7) Hukuman tersebut adalah dengan jelas tidak berlebihan berdasarkan keseriusan jenayah di mana pemenjaraan maksima ialah sepuluh tahun dan denda maksima ialah RM10juta. Wang orang awam melalui aktiviti pengambilan wang secara tidak sah tanpa lesen yang sah tidak tertakluk kepada penyeliaan dan tadbir urus yang wajar oleh Bank Negara Malaysia dan aktiviti yang tidak sah sedemikian akan membawa kepada kerugian teruk yang akan dialami oleh orang awam. Adalah bagi kepentingan awam untuk mahkamah melihat jenayah sedemikian secara serius supaya orang awam yang tidak bersalah tidak akan terpedaya untuk melabur di dalam aktiviti tersebut (lihat perenggan 24).]

Notes

For cases on appeal against sentences, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 375–432.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Megat Halim b Megat Omar v Pendakwa Raya [2008] MLJU 647, CA (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 s 4
Banking and Financial Institutions Act 1989 ss 2, 2A, B, C, D, 4, 6(4), 18(1)(b), 25(1), (3), 103(1)(a), 106(1), First Schedule, Part II (f), Fourth Schedule
Companies Act 1965 Forms 48A, 49
Evidence Act 1950 ss 102, 103, 106

Ram Singh (Ram Singh Harbans & Co) for the appellants.
Anselm Charles Fernandis (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Chew Soo Ho J:

INTRODUCTION

[1] The first appellant was charged with the offence of receiving deposits from the public without a valid licence granted under s 6(4) of the Banking and Financial Institutions Act 1989 (Act 372) ('the BAFIA') to carry on banking, finance company, merchant banking or discount house business between 15 April 2008–13 January 2009 at Lot 14, Blok C, Papar Century Plaza, Papar, Sabah, an offence under s 25(1) of the BAFIA punishable under s 103(1)(a) Serial No 20 Fourth Schedule of the same Act.

[2] Both the second and third appellants were charged as the directors of the first appellant which had received deposits from the public without a valid licence as above stated, thereby committing an offence under s 25(1) read with s 106(1) and punishable under s 103(1)(a) Serial No 20 Fourth Schedule of the BAFIA.

[3] The appellants were found guilty and convicted at the end of the defence case and were sentenced to:

(a) the first appellant: fine of RM3,000,000 (Ringgit Malaysia Three Million);

(b) the second appellant: imprisonment of six years; and

(c) the third appellant: imprisonment of six years.

[4] This appeal is against both the conviction and sentence of the appellants.

[5] Several grounds were listed in the petition of appeal but they are intertwined and can be deduced as follows:

> Whether the learned Sessions Judge had erred in ruling that the Respondent had successfully proved a prima facie case against the appellants under section 25(1) of the BAFIA when the appellants were acquitted from the charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2002 ('AMLATFA') on ground of the Respondent's failure to identify the funds from the illegal deposits taking and the stockiest business; and having called for the Defence, whether the learned Sessions Judge had adequately considered the Defence which was a business concept known as 'Rakan Niaga' participated by partnership and run by stockiest or partners.

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FINDINGS OF THE COURT

[6] The first appellant was a company incorporated under the Companies Act 1965 and both the second and third appellants were the directors of the first appellant. There is no dispute of this fact at the end of the prosecution's case. It is also a fact that none of the appellants possessed a valid licence issued under s 6(4) of the BAFIA. Section 4 of the BAFIA provides:

> 4 No person shall carry on;
>
> (a) banking, finance company, merchant banking or discount house business, unless it is a public company; or
>
> (b) money-broking business, unless it is a corporation,
>
> and holds a valid licence granted under section 6(4) to carry on such business.

[7] Section 25(1) of the BAFIA which provides that no person shall receive, take or accept deposits except under and in accordance with a valid licence granted under s 6(4) to carry on banking, finance company, merchant banking or discount house business, is purely a licensing offence in that anyone who engages in banking business of receiving, taking or accepting deposits as in business carried on by banking or finance company, merchant banking or discount house, he must possess a valid licence in order to do so. Since it is a fact that the appellants had no such valid licence granted under s 6(4) of the BAFIA, the only issue to be determined by the learned sessions judge was whether the business activity carried on by the first appellant with the second and third appellants as its directors amount to 'illegal deposit taking' as it is commonly known.

[8] 'Deposits' as defined under s 2 and modified by s 25(3) of the BAFIA reads:

> 'deposit' means a sum of money or any precious metal, or any precious stone, or any article which is comprised, in part or in whole, of any precious metal or precious stone, and any other article or thing as may be prescribed by the Minister, on the recommendation of the Bank, received, paid or delivered on terms:
>
> (a) under which it will be repaid or returned, with or without interest or at a premium or discount; or
>
> (b) under which it is repayable or returnable, either wholly or in part, with any consideration in money or money's worth,
>
> and such repayment or return being either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment or delivery and the person receiving it, regardless whether the transaction is described as a loan, an advance, an investment, a saving, a sale or a sale and repurchase, but does not include money paid bona fide.

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(A) by way of an advance or part payment under a contract for the sale, hire or other provision of property or services, and is repayable or returnable only in the event that the property or services is not or are not in fact, sold, hired or otherwise provided;

(B) by way of security for the performance of a contract or by way of security in respect of any loss which may result from the non-performance of a contract;

(C) without prejudice to paragraph (B), by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise; and

(D) in such other circumstances, or to or by such other person, as specified in the First Schedule.

[9] The First Schedule contains three parts. Since the sole defence of the appellants was that of a business concept of partnership, the only relevant provision in the First Schedule in relation to para (D) to the definition of 'deposit' under s 2 above maybe Part II (f) of the First Schedule which provides that:

> Money paid to any person, other than a licensed bank, a licensed finance company, a licensed merchant bank or a licensed discount house, by —
>
> (f) any other person in the course of, and for the purpose of, a bona fide lawful business other than money-lending, carried on by such other person.

[10] From the above provisions referred to, it is amply clear that reading ss 4 and 6(4) of the BAFIA together with s 25(1) of the BAFIA, the offence under s 25(1) appears to be akin to an offence of strict liability in the sense that a valid licence is absolutely necessary for any person to receive, take or accept deposits within the meaning ascribed to under the BAFIA and it is for the person who receives, takes or accepts deposits to show that the said 'deposits' were not as defined under s 2 as modified under s 25(3) of the BAFIA or that such 'payments or repayments' were money paid bona fide as provided in the 4 limbs (A) to (D) in the definition of 'deposit' under s 2. From the definition of 'deposit', the respondent needs to prove that a sum of money received by or paid to the appellants is on the terms that (a) under which it will be repaid, with or without interest or at a premium or discount; or (b) under which it is repayable, either wholly or in part, with any consideration in money's worth. So long as one of these ingredients is proved, there is no necessity for the respondent to prove that the appellants did not possess a valid licence granted under s 6(4) of the BAFIA. It is for the appellants to prove that they had a valid licence granted under s 6(4) of the BAFIA. Nevertheless, the respondent in the instant case had undertaken to prove that the appellants indeed were not granted a valid licence under s 6(4) of the BAFIA which is an undisputed fact.

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Once the respondent had proved the ingredient of 'deposit' coupled with the fact that the appellants did not possess a valid licence to conduct such banking activity though not obliged to, the onus of proof under ss 102 and 103 of the Evidence Act 1950 is on the defence to show that such receipts or payments of money were bona fide as prescribed under limbs (A) — (D) in the definition of 'deposit' under the BAFIA. There is, to this court, no nexus or any requirement in law that the respondent must succeed in proving the charges under the AMLATFA before an offence under s 25(1) of the BAFIA can be said to have been proved although the reverse may be otherwise even though the cases were tried together.

[11] In short, even if the appellants were acquitted and discharged from the charges under the AMLATFA for whatever reason it might be, that itself does not vitiate the charges under the BAFIA for simple reason that the ingredients of the charges under s 25(1) of the BAFIA are distinct and separate from s 4 of the AMLATFA charges and s 25(1) of the BAFIA charges are not dependent on the s 4 of the AMLATFA charges. It is therefore untenable to contend that once the appellants were acquitted and discharged from the AMLATFA charges, the s 25(1) of the BAFIA charges could not be maintained. This contention is contrary to the clear provisions of the BAFIA and I find such argument unsustainable. I do not find the learned sessions judge to have erred in law in this respect.

[12] On the issue of the fund in the first appellant's account not being proved as to which sum was derived from the illegal deposits taking and which money was from the stockiest business, I do not find such requirement in law under s 25(1) of the BAFIA.

[13] The burden under ss 102 and 103 of the Evidence Act placed on the appellants is to show that the sums of money received or paid were money paid bona fide as in s 2 definition of 'deposit'. Hence, it is the appellants who must show which money is bona fide payment bearing in mind that the appellants must be expected to maintain proper account under the Companies Act 1965. In addition, whether which part of the fund was from the illegal deposit taking and which part was from the alleged stockist business, these are facts especially within the knowledge of the appellants; hence, the burden of proving this fact is upon the appellants under s 106 of the Evidence Act 1950. However, no statements of account was produced by the appellants to show that the payments received were bona fide and were not tied to the illegal deposits taking nor any witness being called to testify to that effect. The appellants had thus failed to satisfy such evidential burden under ss 102 and103 and/or 106 of the Evidence Act 1950. I do not find this argument alleging that the prosecution must prove through forensic accounting to identify or diagnose the mixed fund as to which part belongs to the illegal deposits taking and which

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part belongs to the stockist business, if any, to be a valid ground. To demand so is to require the respondent to prove the prosecution's case not beyond reasonable doubt but beyond any shadow of doubt which is not the legal burden of proof on the respondent. I do not agree that there is such a requirement in law.

[14] From the evidence adduced before the trial court, it had been proved through the evidence of PW11, the landlord, that the second appellant had rented the premises known as Lot 14, Blok C, Papar Century Plaza, Papar, Sabah ('the said premises') from 1 November 2007–31 October 2010 vide tenancy agreement exh P42, which was used as the premises for the first appellant to operate the business within the period of the charge. Evidence of PW5, PW7, PW10, PW13, PW14 and PW17 showed that the payments made by them were received by the first appellant in the said premises under the alleged business concept of 'Rakan Kongsi Niaga' ('RKN') with 'Untung' (profit). This RKN concept was a scheme where the amount of capital, in whatever amount it might be, paid to or received by the first appellant from the 'investors' would be for a duration of six months and the capital would be returned, as promised, on the fifth month. According to the 'RKN + Untung' forms P17, P21, P25, P27, P28, P29, P82 and P201 respectively, which the 'investors' were required to fill in with their respective particulars, the 'investors' would receive profit for the capital and interest every month for the duration of the six months and at the fifth month when capital return or repayment would be made to the 'investors', the total amount made out would exceed the capital. Evidence of PW3 to PW7, PW10, PW13, PW14 and PW17 gave the same evidence that the capital 'invested' would be returned to them at the fifth month of their respective 'investments'. Receipts issued by the first appellant to the respective 'investors' vide exhs P13, P18, P22, P23, P29, P40, P154, P199 and P200 were tendered which proved unequivocally that the first appellant had received the respective payments in its RKN + *untung* scheme. Evidence of PW8 showed that list of holders of a valid licence granted under s 6(4) of the BAFIA was required to be published in the *gazette* pursuant to s 18(1)(b) of the BAFIA and PW8 produced the *gazettes* exhs P30 and P31 which proved that the appellants were not nor anyone of them was a holder of such a valid licence.

[15] From Forms 48A and 49 of the Companies Act 1965 tendered in court and marked as exhs P37, P38 and P34 respectively, the fact that the second and third appellants were the directors of the first appellant was established by the respondent. Further evidence from the investors, PW5 to PW7, PW10 and PW13 showed the direct involvement of the second appellant who was the person who gave the necessary explanation on the concept of RKN + *untung* to them besides the second appellant being the person who rented the said premises and paying monthly rentals to the landlord PW11; receipts for the

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monthly rentals were also produced as exhs P43 to P58. In respect of the third appellant, evidence of PW14 and PW17 indicated that the third appellant had received the sum of RM1,000 and RM6,000 respectively from them for the said scheme and it was the third appellant who engaged PW14 as an employee and paid salary to the latter for his work of introducing investors to the first appellant.

[16] From the summary of the aforesaid recapitulated evidence as submitted by the learned deputy, I find that the learned sessions judge undertaking a maximum evaluation of the respondent's evidence at the end of the prosecution's case (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC)) and upon a finding of fact did not err in law and in fact when he ruled that the respondent had proved a prima facie case against the appellants to warrant their defence to be called. The evidence both oral and documentary is amply clear that the sum of capital 'invested' by the 'investors' in the first appellant would be returned at the fifth month with the profit although the duration of the investment was fixed at six months. This falls squarely within the definition and meaning of 'deposit' under s 2 of the BAFIA that 'a sum of money received or paid on terms (a) under which it will be repaid, with or without interest or at a premium or discount; or even (b) under which it is repayable, either wholly or in part, with any consideration in money or money's worth and such repayment or return being at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it ...'. Such act of receiving money from the public for a fixed duration with the promise to return the same with profits is indeed an activity of the banking system akin to a fixed deposit in a bank or financial institution. With the main ingredient under s 25(1) of the BAFIA of receiving or taking or accepting deposit from the public having been proved and the fact that the appellants did not possess a valid licence granted under s 6(4) of the BAFIA which the appellants had not and/or could not deny, such evidence undoubtedly warrants the first appellant's defence to be called.

[17] Pertaining to the second and third appellants, evidence showed and proved that they were not only the directors of the first appellant but were also the persons involved in or responsible to certain extent for the management of the affairs of the first appellant. Section 106(1) of the BAFIA provides:

> 106(1) Where any offence against any provision of this Act has been committed by any institution, any person who at the time of the commission of the offence was a director, officer, or controller, of the institution or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of such institution, or was assisting in such management, shall be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances ...

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[18] From the evidence and pursuant to s 106(1) of the BAFIA above, I find that the learned sessions judge was correct to rule that a prima facie case had been established against both the second and third appellants and that their defence was accordingly called.

[19] The defence's version of the event is that the RKN concept of business is on a partnership basis under the stockist business. The learned sessions judge had duly considered this line of the defence and had found that such business concept was not a partnership concept giving his reasons that there was a fixed duration of six months, fixed return of the initial amount, no limit to membership to the said scheme, inter alia. He found from the fact that the alleged concept was more in term of an investment offering fixed and guaranteed returns within a relatively short period of six months compared to other financial institutions and not 'a partnership scheme in which money received from their 'partners' were used to buy items for their partners and run their stockist business'. I do not find the learned sessions judge to be wrong in his findings of facts to justify any intervention; see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 (FC) where it was expressed that the finding of fact is a function exclusively reserved by the law to the trial court. Unless the findings of fact is one which is manifestly wrong, it is not the function of an appellate court to intervene in such finding. The defence had asserted that their business concept of RKN is a partnership business or a stockist business. The definition of the 'deposit' under s 2 of the BAFIA is emphatic that 'regardless whether the transaction is described as a loan, an advance, an investment, a saving, a sale or a sale and repurchase' or as the appellants termed it the RKN concept herein, as long as the sum of money received or paid falls within the terms as stipulated in the said definition, it suffices to satisfy the meaning of 'deposit' and the available defence seems to be that 'it does not include money paid bona fide' in the four limbs (A) — (D) therein. It is also clear from the evidence that there was no such term of partnership being formulated because the parties can come in to join the scheme with any sum of money at any time and within the stipulated period, they could leave and the money would be returned with profits which were promised. There is no evidence that the parties who paid the money to first appellant also shared the liabilities of the company as a partner will nor were they involved in the management of the company. It is also apparent that the defence did not lead evidence to raise a doubt within the four situations vide limbs (A) — (D) including the First Schedule but it averred that the business was legitimate and does not contravene any law. A mistake in law is no defence as ignorance of the law is no excuse. The law as stipulated in s 25(1) read with s 2 definition of 'deposit' and s 106(1) of the BAFIA prescribes the offence in clear term. It is unsustainable for the defence to contend that they are ignorant of the law as it is the appellants' duty and responsibility to find out before they embarked onto such business.

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[20] As to the third appellant's denial in the defence stage of any of his involvement in the first appellant company and his denial that he was a director having signed the Forms 48A and 49 of the Companies Act 1965, I am inclined to agree with the respondent's submission that such defence which was only raised during the defence's stage amounts to an afterthought for reason that when the Forms 48A and 49 were tendered by the prosecution and marked as exhibits, they were not objected to; moreover, the material witness or witnesses of the prosecution were not challenged in cross-examination with this alleged defence of the third appellant. In *Megat Halim b Megat Omar v Pendakwa Raya* [2008] MLJU 647, the Court of Appeal said at paras [63]–[66] that:

> ... it is trite that his defence should be put to the prosecution at an early stage during the prosecution's case. Failure to do so may move the trial court to dismiss a particular line of defence as an afterthought, or a recent invention as happened in this case.

[21] See also *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 (SC), where Edgar Joseph Jr SCJ said at p 568:

> ... the trial judge appreciated correct law when he held, as he did in fact hold, that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves the defence to do so, for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticised for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention

[22] The law is trite in this aspect of the third appellant's defence which is vividly unsubstantiated by any cogent evidence but a bare denial; no evidence was called for by him to prove his allegation that his signatures on the Forms 48A and 49 were not his or allegedly forged. Such allegation was also not put to any witnesses for the prosecution including the investigating officer. Such defence cannot be construed as a valid defence. Therefore any non-direction does not amount to misdirection since there is no merit in such defence which ought to be rejected; no injustice would occasion as a consequence.

[23] On the totality of the evidence, I do not find that the learned sessions judge as a whole had erred in law and in fact in finding that the defence had failed to raise a reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond a reasonable doubt at the end of the defence's case. Consequently, I find no reason to interfere with the learned sessions judge's finding of guilt and the conviction on the appellants.

[24] On the issue of sentence, the fourth column in the Fourth Schedule of BAFIA provides for the imprisonment term of ten years while the fine provided in the fifth column is RM10m and/or a daily fine of RM100,000 as provided

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in the sixth column. The first appellant being a company was fined RM3,000,000 while the second and third appellants were each sentenced to six years imprisonment without any imposition of fine. I do not find the sentences to be manifestly excessive in the light of the seriousness of the crime where the maximum imprisonment is ten years and a maximum fine of RM10m. Money of members of the public through such illegal deposit taking activity without a valid licence would not be subject to proper supervision and governance by Bank Negara Malaysia and such illegality activity would ultimately lead to great losses suffered by the public who 'invested' their money in the hope of getting a better returns as promised by the illegal operators than the normal commercial banks or financial institutions which are licensed under s 6(4) of the BAFIA and it also disrupts the banking system. It is thus in the public interest that the court ought to view such crime seriously so that innocent public may not be lured to invest in such activity which ends up in great loss and suffering to them. Although there is a general trend that a fine is imposed on an accused person besides the imprisonment term ordered, in this case however, I find that the six years imprisonment imposed on the second and third appellants would suffice as a deterrence not only to the second and third appellants but also to any would be offender under this offence and I do not think it justified to revise the sentence of the trial court with an additional fine. On the fine imposed on the first appellant, it is neither manifestly excessive nor unreasonable for which I have no valid ground to intervene.

Appeal against conviction and sentence dismissed.

Reported by Kanesh Sundrum